

2009/11/22 - IV. ÚS 956/09: RIGHT TO LAWFUL JUDGE

HEADNOTES

Provision § 221 par. 2 of the Civil Procedure Code in its words “or that serious defects occurred in the proceeding” is consistent with the constitutional order, because it pursues the protection of another constitutionally guaranteed right, and does so through means that are proportional (necessary); nevertheless, at the same time this provision places considerable demands on the body applying it, which must use it responsibly and interpret it in direct connection with Art. 4 par. 4 of the Charter (more on this below).

The purpose of § 221 par. 2 of the Civil Procedure Code as a whole, as explained above, is primarily to “unblock” a proceeding that is burdened by the inability of the first-level court to conclude the matter in a lawful manner. This purpose is served both by the possibility or removing a case from a judge due to failure to respect a legal opinion, and due to the existence of serious defects in the proceeding. Thus, § 221 par. 2 of the Civil Procedure Code implements the right to judicial protection (it will be possible to conclude the case) and prevents delays in a proceeding. Of course, the requirement of restrictive interpretation of the latter competence (removing a case due to serious defects in a proceeding) indicates that this will always be an exceptional step, justified by the high probability that if the matter were left to the present judge, he would not be able to conclude the proceeding in a manner that the appeals court could approve of. In the event of doubts, the court should always incline toward the constitutionally guaranteed stability of the composition of a court, especially in a review of a first judgment issued in a matter, where the first-level court has not yet been given guidance.

The High Court, as the appeals court, did not provide sufficient justification for its decision to remove the case from judge JUDr. Vojtěch Cepl, because from a constitutional law standpoint, for such a step, a mere list of serious defects that the court first-level court was to have committed, without stating reasons for the concern that further proceedings before the same judge will not fulfill the parameters of a fair trial, is not sufficient. The lack of appropriate justification is a violation of the complainant’s constitutionally guaranteed right to a lawful judge under Art. 38 par. 1 of the Charter, because it removes the case from the originally assigned judge, without the requirements for such a step having been met.

Because the Constitutional Court found the contested decision to have a defect, consisting of the lack of appropriate justification, which by itself was sufficient grounds for cassation of the contested verdict, it was not required to proceed to the next step, which would have been a substantive review of whether the reasoning was consistent with the complainant’s constitutionally guaranteed right to a lawful judge, including an evaluation of whether or not the first-level court was correctly criticized for defects.

**CZECH REPUBLIC
CONSTITUTIONAL COURT
IN THE NAME OF THE REPUBLIC**

JUDGMENT

A panel of the Constitutional Court, consisting of the chairman, Vlasta Formánková, Judge Miloslav Výborný and Judge Michaela Židlická, in the matter of the complainant, Mgr. M. B., represented by JUDr. Petr Hála, MBA, attorney, with his registered office at Vinohradská 1511/230, Prague, with the participation of the High Court in Prague, with its registered office at náměstí Hrdinů 1800, Prague 4, as a party to the proceeding and 1) JUDr. Petr Coufal, 2) JUDr. Karel Černovský, represented by JUDr. Josef Lžičař, attorney, with his registered office at Sokolovská 24/37, Prague 8 - Karlín, 3) JUDr. Libor Grygárek, represented by JUDr. František Schulmann, attorney, with his registered office at Valentýnská 92/3, Prague 1, 4) JUDr. Pavel Kučera, represented by JUDr. Jaroslav Ortman, CSc., attorney, with his registered office at Španielova 1267, Praha 6, 5) JUDr. Pavel Němec, represented by JUDr. Petr Toman, attorney, with his registered office at Trojanova 12, Prague 2, 6) JUDr. Arif Salichov and 7) JUDr. Renata Vesecká, represented by JUDr. Josef Lžičař, attorney, with his registered office at Sokolovská 24/37, Prague 8 - Karlín, as secondary parties to the proceeding on the constitutional complaint against verdict II. of the resolution of the High Court in Prague of 23 February 2009 ref. no. 1 Co 349/2008-322, and on the petition to annul in § 221 par. 2 of Act no. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, the words “or that serious defects occurred in the proceeding,” ruled as follows:

I. The petition to annul in § 221 par. 2 of Act no. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, the words “or that serious defects occurred in the proceeding,” is denied.

II. Verdict II. of the resolution of the High Court in Prague of 23 February 2009 ref. no. 1 Co 349/2008-322 is annulled.

REASONING

I.

1. On 17 April 2009 the Constitutional Court received a petition to open proceedings on a constitutional complaint under § 72 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations (the “Act on the Constitutional Court”), in which the complainant sought annulment of verdict II. of the resolution of the High Court in Prague (the “High Court”) of 23 February 2009 ref. no. 1 Co 349/2008-322 and also annulment in § 221 par. 2 of Act no. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations (the “Civil Procedure Code”), of the words “or that serious defects occurred in the proceeding,” because she believed that the application of the unconstitutional

provision of § 221 par. 2 of the Civil Procedure Code, in eventum an unconstitutional interpretation thereof, unjustifiedly interfered in her constitutionally guaranteed right to a lawful judge under Art. 38 par. 1 of the Charter of Fundamental Rights and Freedoms (the “Charter”). According to the complainant, verdict II. of the High Court resolution of 23 February 2009 ref. no. 1 Co 349/2008-322 also suffered such serious defects that it violated her constitutionally guaranteed right to a fair trial under Art. 36 par. 1 of the Charter and Art. 6 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the “Convention”).

2. The complainant justified the petition to annul part of § 221 of the Civil Procedure Code as follows: The purpose of the institution of a lawful judge is primarily to protect a party from arbitrariness in the appointment of the trial court. However, this provision of the Civil Procedure Code permits a case to be removed from a judge on the basis of very vaguely defined grounds (serious defects in the proceeding), whose content depends considerably on the discretion of the appeals court judges. Thus, the requirement of transparency and predictability when appointing a court is not met, and the possible misuse of this institution for self-serving ad hoc appointments of judges cannot be ruled out. The appeals court does not have the right to decide on the personnel of a lower court; its task is to review the contested decision of the first-level court, and preceding proceedings from the perspective of the grounds for appeal, and, on the basis of that review, remove any defects in the procedure prescribed by the Civil Procedure Code, i.e. to change the defective decision, or annul it together, with a precise specification of the reasons that led it to this step. The appeals court could change the personnel of the first-level court only if a serious defect in the proceeding, resulting in the reviewed decision being unlawful, could not be removed otherwise than by changing the judge. Of course, for this purpose that part of § 221 par. 2 of the Civil Procedure Code that concerns failure to respect the legal opinion expressed by the appeals court is fully sufficient. Although in that event there would be interference in the right to a lawful judge, it can be justified by the interest in ensuring unity and predictability of court decisions in factually identical cases. However, no such justified interest can be found in the contested part of the provision in question; thus, there is completely unjustified interference in the constitutionally guaranteed rights of the parties to the proceeding. If the appeals court believes that errors occurred in the proceeding before the first-level court, and it is therefore appropriate to annul its decision, the appeals court is required to describe in the reasoning of its judgment the defects in the first-level court’s decision, precisely and persuasively, so that the court can correct its decision based on these instructions. There is no defect in a proceeding that a qualified judge or panel would not be able to correct. If there were really a defect that was impossible to correct, then it would make no sense to annul the decision of the first-level court, and the appeals court should make a decision itself. If the cause of the claimed defects is the poor quality of a judge’s work, that cannot be solved by applying the contested Civil Procedure Code provision, but by a disciplinary proceeding. In any case, even assigning a case to a different judge does not guarantee that no defects will occur in the rest of the proceedings, which was apparently the purpose of the contested provision. Likewise, the background report to Act no. 59/2005 Coll., which amends the Civil Procedure Code and certain other Acts, expresses the legislature’s doubts as to whether this provision is

constitutional; arguments that it has been present in the legal order for a long time and no one has contested it yet are not legally relevant. The contested part of § 221 par. 2 of the Civil Procedure Code is extremely inconsistent with Art. 38 par. 1 of the Charter, and this cannot be corrected by a constitutionally conforming interpretation of this provision; also, in terms of the aim pursued, i.e. ensuring the predictability of court decisions, this is an obviously redundant regulation. Application of the contested provision also often leads to delays in proceedings, from which one can conclude that it is also inconsistent with Art. 36 par. 1 and Art. 38 par. 2 of the Charter.

3. The complainant also stated her belief that, even if the Constitutional Court finds the contested part of § 221 par. 2 of the Civil Procedure Code consistent with the constitutional order, it should annul verdict II. of the High Court resolution of 23 February 2009, ref. no. 1 Co 349/2008-322, because the High Court did not apply the provision in a constitutionally conforming manner, and its decision unjustifiedly interfered in the complainant's constitutionally guaranteed rights. Application of the contested part of § 221 par. 2 of the Civil Procedure Code would come into consideration only if there were justified grounds to fear that the proceeding would not be conducted in accordance with the legal opinion of the appeals court and in accordance with the law, if it is conducted before the same panel or the same individual judge. In other words, the appeals court would have to conclude that the individual first-level judge will not be capable of correcting the defects pointed out, and it would have to appropriately justify this conclusion. However, the High Court resolution lacks such justification, which is, in and of itself, a violation of the complainant's constitutionally guaranteed right to a fair trial. The High Court only stated that it took into account the gravity of procedural errors made by the judge, consisting of a failure to respect the principle of concentrating proceedings, admission of evidence regarding facts that were not claimed at all, or were claimed only in the complainant's final petition, and failure to respect the right of the parties to respond to all evidence that was admitted. Here the complainant very extensively analyzed the individual errors that the Regional Court was to have committed according to the reasoning of the High Court resolution; the core of her arguments was the claim that the High Court's conclusions are incorrect or disputed, and if the actions of the Regional Court were really burdened by these defects, they would also be defects that this court could correct in a subsequent proceeding. The complainant also believed that the High Court incorrectly understood the concept of notoriety, and did not in any way deal with the fact that the secondary party JUDr. Renata Vesecká waived the duty of confidentiality of her subordinates who appeared as witnesses in only a very limited scope, which made it impossible to prove a number of facts, and therefore the court had no choice but to request the appropriate evidence itself, in accordance with § 120 par. 3 of the Civil Procedure Code.

4. The complainant also proposed that the Constitutional Court, in accordance with § 79 par. 2 of the Act on the Constitutional Court, postpone enforceability of the contested provision, because otherwise a situation could arise where a proceeding would be held in the interim before the Regional Court, conducted by a different judge, which, if the Constitutional Court were to grant the constitutional complaint, would be affected by a serious defect and would have to be conducted again. The complainant also proposed that the matter be reviewed as urgent,

under § 39 of the Act on the Constitutional Court, and that it be decided on a priority basis, because the further conduct of the proceeding before the Regional Court depends directly on the decision about the constitutional complaint, and the proceeding could thus be delayed.

II.

5. As the constitutional complaint was filed on time, was admissible, and also met all the formal and substantive requirements prescribed by the Act on the Constitutional Court, the Constitutional Court to turn to a substantive review.

6. Together with this finding, the Constitutional Court, by resolution of 27 April 2009, ref. no. IV. ÚS 956/09-19, granted the complainant's petition, and pursuant to § 79 par. 2 of the Act on the Constitutional Court, postponed the enforceability of the contested verdict II. of the High Court resolution of 23 February 2009, ref. no. 1 Co 349/2008-322. It then called on the party and the secondary parties to the proceeding to respond to the constitutional complaint.

7. In its statement, the High Court expressed its belief that verdict II. of the resolution of 23 February 2009, ref. no. 1 Co 349/2008-322, is not inconsistent with Art. 38 par. 1 of the Charter, the second sentence of which states that the jurisdiction of courts and the competence of judges shall be provided for by law. The Civil Procedure Code permits taking a case away from a lawful judge not only in § 221 par. 2, but also in § 12 and § 14; based on the latter, Judge JUDr. Ludmila Říhová was removed from hearing and deciding the matter by decision of the Supreme Court and by a measure issued by the chairman of the High Court. As regards application of § 221 par. 2 of the Civil Procedure Code, the High Court cited the reasoning of its resolution of 23 February 2009, ref. no. 1 Co 349/2008-322, as well as its resolution of 12 January 2009, ref. no. 1 Co 350/2008-318, in which it criticized the Regional Court for deciding on the secondary party, Hamad bin Abdulla Thani-Al Thani, joining the proceeding, although the devolutive effects of the appeal prevented it. In the High Court's opinion, the Regional Court's errors, analyzed in detail in the cited decisions, was of such a nature that the proceeding thus far could not be considered a fair trial, and it was necessary to proceed according to § 221 par. 2 of the Civil Procedure Code in order to ensure that the proceeding would continue lawfully.

8. Secondary party no. 4), citing § 72 par. 1 let. a) and § 74 of the Act on the Constitutional Court, stated that a requirement for submitting an accessory petition seeking the annulment of a legal regulation is that, in a proceeding in which the complainant was a party, an effective decision, a measure, or other intervention by a public authority violated the complainant's constitutionally guaranteed rights. Only after the existence of specific unjustified interference in constitutionally guaranteed rights is proved to the Constitutional Court can the complainant join his constitutional complaint with a petition seeking the annulment of a legal regulation. Yet, in her petition, the complainant is proceeding in exactly the opposite way, which is not permitted. Regarding the complainant's petition seeking annulment of par of § 221 par. 2 of the Civil Procedure Code, the secondary party, in accordance with the High Court's opinion, stated that each

party to a proceeding has a right to a lawful judge under conditions set forth by law, and pointed to other situations foreseen by the Civil Procedure Code, where there is a change of the lawful judge; in a decision to remove a judge due to bias, for example, that is also done at the discretion of the deciding panel of judges. Thus, deciding to change a judge on grounds of serious defects in the proceeding is one of the legal possibilities. The secondary party did not agree with the complainant's opinion that removing the case [from the lawful judge] endangers the right to a fair trial. In his opinion, the provision in question implements the principle of observance of the law and the correct application thereof, and it also prevents delays in the proceeding, i.e., on the contrary, this strengthens the guarantees that a proceeding will be conducted correctly. As the complainant stated that it is not certain that the claimed defects will be removed after assigning the matter to a different judge, it is necessary to emphasize that it is not possible, in any proceeding, to completely prevent defects from arising, it is only possible to minimize them. It is up to the legislature to adopt suitable rules for this purpose, and one of these is § 221 par. 2 of the Civil Procedure Code, part of which the complainant proposed to be annulled. In relation to the part of the constitutional complaint aimed against the contested High Court resolution, secondary party no. 4) emphasized some errors that the Regional Court was alleged to have made according to the reasoning of that decision, primarily conducting the presentation of evidence "ultra petitem," impermissible review of decisions by bodies active in criminal proceedings, and violating the principle of equal weapons. Therefore, secondary party no. 4) proposed that the constitutional complaint be denied as unjustified.

9. Secondary party no. 5) also did not agree with the arguments in the constitutional complaint and proposed that the Constitutional Court deny it as obviously unjustified under § 43 par. 2 let. a) of Act no. 99/1963 Coll., the Civil Procedure Code. Regarding the proposal to annul part of § 221 par. 2 of the Act on the Constitutional Court, the secondary party stated that the institution of removing a matter from a judge in connection with annulling the decision of a trial court was inserted into the Civil Procedure Code with effect as of 1 January 2001 (at that time it was § 221 par. 3 of the Civil Procedure Code), and that this legal provision is not unique in Czech or foreign law. In this regard he pointed to § 262 first sentence of Act no. 141/1961 Coll., on Criminal Court Proceedings, as amended by later regulations (the "Criminal Procedure Code"), which governs the possibility of removing a matter more generally, and to Art. 386 § 5 of the Polish Civil Procedure Code (Kodeks postępowania cywilnego) and § 563 par. 1 of the German Civil Procedure Code (Zivilprozessordnung). The secondary party emphasized that the Constitutional Court has already in the past considered constitutional complaints aimed against decisions made on the basis of § 221 par. 2 (par. 3) of the Civil Procedure Code, as well as under § 262 of the Criminal Procedure Code (III. ÚS 90/95, IV. ÚS 307/03, IV. ÚS 111/04, III. ÚS 188/09), and never found grounds for annulling these provisions in a procedure pursuant to § 70 par. 1 of the Act on the Constitutional Court. The secondary party also cited the conclusions in Constitutional Court resolution of 19 January 2006, file no. IV. ÚS 111/04: "The legislature assumed that this institution would be applied only on the basis of a restrictive interpretation, so that there would be minimal interference in the right guaranteed in Art. 38 par. 1 of the Charter. In the background report the legislature made use of this provision subject to the requirement that the grounds

for annulling the decision of the trial court was of the nature of a serious (i.e. not ordinary) defect, and also emphasized that even in these cases it is not always appropriate to reassign a case - only if, in the opinion of the appeals court, supported by specific facts, there is reason to fear that the proceeding would not end in an appropriate manner if it was conducted before the same panel (or individual judge) or court. ... the Constitutional Court is of the opinion that application of § 221 par. 3 of the Civil Procedure Code could, if it were interpreted too expansively, cause interference in the constitutionally guaranteed right to a lawful judge; at the same time, however, it has in mind the principle that interpretation of the term “serious defect” is up to the general courts. If a general court adequately and meaningfully justifies application of § 221 par. 3 of the Civil Procedure Code, it is not within the competence of the Constitutional Court to question in any way the use of this institution, which is a statutory exception within the framework of the constitutionally guaranteed right to a lawful judge. ...,” with which it agreed. The institution of a lawful judge is an important element of legal certainty; the existence of the exception in § 221 par. 2 of the Civil Procedure Code changes nothing about this, because it is tied to serious defects in the proceeding before the trial court, which, if they are found to exist, justify constitutional removal of the matter from the lawful judge. The possibility of contesting such actions by an appeals court in individual cases through a constitutional complaint provides a sufficient guarantee that the bounds of this extraordinary provision will not be exceeded or that it will not be misused. The secondary party expressed the belief that a constitutionally conforming interpretation of § 221 par. 2 of the Civil Procedure Code is possible, including of the part contested by the complainant, and that therefore it is not necessary to annul it (III. ÚS 188/09). The secondary party also took a position on the contested High Court resolution, when he pointed to the fact that the grounds for proceeding pursuant to § 219a par. 1 let. a) and § 221 par. 2 of the Civil Procedure Code were duly explained in the reasoning of the contested decision; in providing the reasoning for verdict II. it was no longer necessary to again list the defects that the Regional Court committed, and in terms of the certainty and understandability of the reasons for the decision a reference to the reasoning for verdict I. was quite sufficient. As regards the removal of the case itself, this is undoubtedly interference in the constitutionally guaranteed right to a lawful judge, however, it need not be unjustified a priori, because even the right to a lawful judge has its limits, and one of them is precisely § 221 par. 2 of the Civil Procedure Code. According to the secondary party, interference in right to a lawful judge can be justified if it was done on the basis of the law, pursued a legitimate aim, and was proportionate intervention that preserved, to the maximum extent possible, constitutionally guaranteed rights (Art. 4 par. 4 of the Charter, Constitutional Court judgments file no. IV. ÚS 188/94, I. ÚS 437/02). The secondary party considered it obvious that the removal was legal, and considered the legitimate aim to be removal of a case from a judge who, due to the seriousness of errors made in the previous proceeding, can no longer be a guarantee of a fair trial. The secondary party listed seven errors that the Regional Court was alleged to have committed, three of them serious enough that the High Court considered it necessary to assign the matter to a different judge. The secondary party addressed those three fundamental errors (violation of the principle of concentrating proceedings, failure to respect the subject matter delineated by the complaint and presentation of evidence not related to the subject matter of the proceeding, and

failure to respect the right of the secondary parties to respond to all the evidence presented) in detail, and his conclusions agreed with the High Court's opinion. As regards the proportionality of the interference, the secondary party stated that in view of the gravity and number of errors, there was no other possibility than to remove the matter from judge JUDr. Vojtěch Cepl, because there was a justified concern that this judge would not be able to decide fairly in further proceedings. The secondary party also noted that, after the matter was removed, it would be decided by another judge of the Regional Court appointed on the basis of caseload allocation, so it will not be a judge appointed ad hoc. In conclusion, the secondary party stated that his constitutionally guaranteed rights were violated in the proceeding before the Regional Court, particularly the right to a fair trial, the right to equal standing of the parties, and the right to respond to the evidence presented. The actions of the Regional Court judge, who flagrantly violated the basic principles of a civil trial, aroused doubts about his impartiality, and therefore the interference by the High Court was quite appropriate, and the complainant's constitutionally guaranteed rights were not violated.

10. Secondary parties no. 2), 3) and 7), like the secondary party no. 5), stated that the High Court concluded correctly that there are justified doubts as to whether judge JUDr. Vojtěch Cepl will be able to act in accordance with the law and the principles of a fair trial in a further proceeding. According to the secondary parties, it is obvious that in this deliberation the High Court took into account its previous experience with the correction of defective decisions by this judge. The secondary parties believed that the proceeding before the trial court was conducted in an unconventional manner by this judge, and that he impermissibly influenced the conduct of the appeals proceeding with his statements to the media, and thus himself sent a signal that he was ruling himself out of further participation in the matter. According to the secondary parties, it was a matter of professional courtesy that the High Court, in the reasoning of its decision, did not state that this was not the first time that it had to remove a case from this judge. Judge JUDr. Vojtěch Cepl acted very idiosyncratically in other cases as well; his decisions were inconsistent with substantive and procedural law (e.g., the matter conducted before the Regional Court as file no. 36 C 116/2006), and had to be subsequently corrected through appeals proceedings. This was apparently the source for the High Court's belief that a matter as complicated as evaluating the complainant's degrading claims could not be left to this judge. In view of the foregoing, the secondary parties considered it necessary for the Constitutional Court to acquaint itself with the prior decision making of judge JUDr. Vojtěch Cepl; therefore, they proposed that the Constitutional Court request as evidence all the decisions issued by that judge that had not gone into effect and that were subsequently annulled or amended by the High Court, as the appeals court, including related decisions of the High Court, over a period of at least the last three years. The secondary parties were unable to obtain these data by the deadline, because the Ministry of Justice, despite its publicly declared intent to publish the content of all decisions that have not gone into effect, has not yet done so; therefore, they asked the Constitutional Court for assistance and for a deadline extension. They believe that by comparing the previous decision making of judge JUDr. Vojtěch Cepl it is possible to determine whether there is a justified expectation that the defects will be duly removed in the subsequent proceeding. The secondary parties reserved the right to respond to the complainant's further

arguments at a time when the abovementioned documents are gathered; nonetheless, they stated that they are already of the opinion that the constitutional complaint is quite unjustified and that the arguments used in it show signs of being self-serving. The secondary parties also expressed the opinion that when the complainant sees how judge JUDr. Vojtěch Cepl made decisions in the past, she will revise her position on the contested verdict in the High Court resolution.

11. The complainant submitted a response to the abovementioned statements in which she maintained her opinion that part of § 221 par. 2 of the Civil Procedure Code and verdict II. of the High Court resolution were unconstitutional. The secondary parties believed that there was a real risk that, without a change in court personnel, further proceedings would be conducted in an unlawful manner. In the complainant's opinion, in a situation where a judge is bound by the legal opinion of the appeals court, one cannot a priori presume that he will not proceed according to that opinion. A pregnant statement of the grounds on which the first-level court's decision was annulled should be a sufficient guarantee that the claimed defects will be removed. According to the complainant, the risk that the first-level court will not be guided by the clear and precisely stated binding opinion of the appeals court arises only if the judge is not able or willing to avoid the errors that the appeals court criticized. In that case it would be completely appropriate to reprimand the judge through a disciplinary proceeding and subsequently apply § 221 par. 2 of the Civil Procedure Code on the grounds of failure to observe a binding legal opinion. The complainant also emphasized that appeals court judges should not be called upon to evaluate the erudition of the first-level judges. In the decision making of the appeals court one can observe that certain personal ties arise, whether positive or negative, between that court and the first-level court whose decisions the appeals court reviews with considerable frequency, in particular in areas with a lower incidence of cases, such as, for example, disputes concerning protection of the person. Thus, application of the contested provision does not lead to improving the quality of the work of the first-level of court, but only to transferring "non-erudite" judges to conduct different proceedings, which can consequently harm the parties therein. If a judge is not capable of acting impartially, even after a warning from the appeals court, then he obviously lacks the qualifications to hold the office of judge, and should be subject to a disciplinary proceeding. The fact that this is not done in the Czech Republic because the statutory options are not exercised properly cannot justify leaving the contested provision, which, in the complainant's opinion, is unconstitutional, in the legal order of the Czech Republic. The complainant rejected an analogy between the contested provision and the regulations for removing a judge due to bias (§ 14 to 16b of the Civil Procedure Code), because the deadlines in which an objection of bias must be made lead one to conclude that the legislature's purpose was to ensure that the entire first-level proceeding be conducted by the same individual judge or the same panel, with the same judges, i.e. the decision to remove a judge must be made as soon as possible in a proceeding, which is inconsistent with the rule in § 221 par. 2 of the Civil Procedure Code. Moreover, the fact that the reason for removing a judge on the grounds of bias is precisely the presumption that the judge will not act impartially makes it obvious that in other cases the legislature presumes that the judge is able to be impartial. As stated above, any shortcoming in a judge's impartiality is to be addressed in a disciplinary proceeding, not through

application of the contested provision. The complainant repeated her arguments regarding the ability to remove defects already contained in the constitutional complaint, and pointed out that, while the concept of bias is clearly defined by case law and doctrine, the content of the term “serious defects in the proceeding” is uncertain, which permits wide application of the term, which then comes with a real danger that the principle of a lawful judge will be circumvented and the fundamental principles of a democratic judiciary will be violated. Thus, it is evident that there is no meaningful justification for the contested provision; it does not contribute to improving the quality of judicial decision making, but merely provides the appeals court an instrument for unjustified limitation of the rights of the parties to a proceeding to a lawful judge.

12. If the Constitutional Court does not find the contested § 221 par. 2 of the Civil Procedure Code unconstitutional, it should [according to the complainant] annul verdict II. of the High Court resolution on the grounds of constitutionally non-conforming application of that provision. The High Court also did not respect the conclusions arising from Constitutional Court resolution file no. IV. ÚS 111/04, which secondary party no. 5 cited, because under that decision application of the contested part of § 221 par. 2 of the Civil Procedure Code can be considered only if the appeals court has a justified fear that a repeated proceeding conducted by the same panel (or individual judge) would, in view of the nature of the errors committed, end unfairly. The appeals court is required to state these grounds in the reasoning of its decision, but that did not happen in this matter. The High Court was supposed to state on what basis it had concerns that judge JUDr. Vojtěch Cepl would not be capable of proceeding within the bounds of its decision in a repeated proceeding, and also why, in its opinion, that concern was not only hypothetical, but was highly likely to be fulfilled. The complainant believed that there were no reasonable grounds for such concern, and so the High Court also could not state them in the reasoning of its decision, and also could not, pursuant to Constitutional Court resolution file no. IV. ÚS 111/04, apply the contested provision of the Civil Procedure Code. According to the complainant, the claim of secondary parties no. 2), 3) and 7), that this reason, not stated in the reasoning of the High Court’s decision, could have been the appeals panel’s past bad experiences with the quality of decision making by judge JUDr. Vojtěch Cepl, demonstrates failure to understand the purpose of the appeal proceeding, which is to correct errors that arise in a particular first-level proceeding. Applying any past experiences obtained from previous decision making would be a flagrant violation of the principle of impartiality and the constitutionally guaranteed right of the parties to a fair trial. Likewise, the criticism of the cited judge, for thoroughly respecting the principle of a public trial and being willing to defend his decision in an understandable manner before the public and thus increase confidence in the judiciary, was completely unjustified. In connection with the accusations concerning the judge’s incompetence and impartiality [sic], the complainant repeated that this cannot be grounds to remove the case from him, but, on the contrary, is grounds to open a disciplinary proceeding. However, the secondary parties did not resort to such a step, because the decision in question by judge JUDr. Vojtěch Cepl was highly thought of by the legal profession. In the complainant’s opinion, the Constitutional Court should deny the petition from some secondary parties that the Court request all the not yet effective decision of that judge and the related High Court decisions, on the grounds of irrelevance. The

complainant briefly looked up in a legal information database a number of decisions of panel 1 Co of the High Court, which were subsequently annulled by the Constitutional Court; some of them concerned cases decided at the trial level by judge JUDr. Vojtěch Cepl, whose actions the Constitutional Court thus approved of. Following the logic of the secondary parties, the complainant should now propose that the Constitutional Court, in addition to annulling verdict II. of the contested High Court decision, also rule that the matter be handled by a different panel of the High Court (§ 63 of the Act on the Constitutional Court k § 221 par. 2 of the Civil Procedure Code). However, the complainant did not make such a proposal, because she considers it impossible to seek application of an unconstitutional legal norm. For all these reasons the complainant maintained the proposals contained in her constitutional complaint.

13. On 20 October 2009 the Constitutional Court received a supplement to the statement from secondary parties no. 2), 3) and 7), with an appendix containing decisions of the Regional Court issued in other cases by the individual judge JUDr. Vojtěch Cepl and related cassation decisions by the High Court. The complainants proposed introducing these decisions as evidence proving that the High Court's reasoning, that it was necessary to assign the matter to another judge, was correct. According to the secondary parties it was obvious that the High Court did not err in the matter, because it was purely up to its discretion, what procedure to choose. If it found that the proceeding suffered from errors that judge JUDr. Vojtěch Cepl would evidently not be able to remove, it was fully in the court's competence to remove the matter from the judge. The secondary parties analyzed in detail the errors that the Regional Court was alleged to have committed, and stated that they fully agree with the High Court's opinion stated in the reasoning of the contested decision. The secondary parties described the objections in the constitutional complaint, as well as the proposal to annul part of § 221 par. 2 of the Civil Procedure Code, as unjustified; as regards the proposal to annul the cited provision they pointed to the similarly worded § 262 of the Criminal Procedure Code and commentary on it, according to which doubts about a judge's impartiality, in view of the scope and nature of errors, is usually a reason for removing a case from the judge. Of course, according to the commentary, a need to have a matter decided by a more experienced judge can also be such a reason. The Supreme Court also ruled that it is not a violation of the right to a lawful judge if a matter is assigned to a different judge, in view of defects that affected the proceeding. The secondary parties also stated that judge JUDr. Vojtěch Cepl did not proceed in a standard manner in the proceeding, and subsequently, by commenting on his as yet ineffective decision for the media, ruled himself out of further handling of the case. The secondary parties believe that the High Court could not be criticized for anything, because in the interests of a fair trial it could not decide otherwise than it did.

III.

14. During the hearing, no proposals to supplement the evidence were made, and the testimony of the parties did not indicate any new facts beyond the scope of the petition and written responses to it.

IV.

15. The Constitutional Court determined from Regional Court file no. 36 C 8/2008 that the secondary parties, in a complaint delivered to the Regional Court on 15 January 2008, sought an order for the complainant to send each of them a written apology in the wording “I apologize to you for untruthfully describing you on 20 December 2007 in the Czech Radio program Ozvěny [Echoes] as a member of the backstage judicial mafia, who tries to completely control the judiciary so that it would serve the government’s garniture, and who influences court cases in the background,” and to send a notice to the Czech press Agency stating the same. According to the Regional Court’s case allocation schedule, the matter was assigned to judge JUDr. Vojtěch Cepl. The Regional Court, by judgment of 5 June 2008 ref. no. 36 C 8/2008-141, denied the complaint by secondary parties no. 1), 2), 4), 5), 6) and 7) (verdicts I. and IV.); as regards secondary part no. 3) it granted the complaint (verdicts II. and III.) and ruled on the costs of the proceeding (verdict V., VI. and VII.). By resolution of 2 July 2008 ref. no. 36 C 8/2008-262, the Regional Court ruled not to allow Hamad bin Abdulla Thani Al-Thani to join the proceedings as a secondary party, denied the petition to correct the reasoning of the abovementioned judgment, and corrected part of verdict I. of the judgment. Secondary parties no. 1), 2), 4), 5), 6) and 7), and the complainant then filed an appeal against the Regional Court judgment of 5 June 2008 ref. no. 36 C 8/2008-141. Based on these appeals, the High Court, by resolution of 23 February 2009, ref. no. 1 Co 349/2008-322, annulled the High Court’s judgment and returned the matter to it for further proceedings (verdict I.). The High Court also ordered the matter to be decided by a different individual judge (verdict II.), and justified that verdict as follows: “In view of the abovementioned defects in the proceeding, the appeals court ordered, pursuant to § 221 par. 3 of the Civil Procedure Code, that the matter be further handled and decided by a different individual judge. In adopting this measure, it took into account the gravity of the procedural errors made by the first-level judge, in particular the failure to respect the principle of concentrating a proceeding, the admission of evidence regarding facts that were not alleged at all, or alleged only in the defendant’s final petition, and the failure to respect the rights of the parties to respond to all evidence that was admitted.”

V.

16. The complainant first of all considered unconstitutional the very competence of the appeals court to remove the matter from the lawful judge on the grounds of serious defects in the proceeding, arising from § 221 par. 2 of the Civil Procedure Code. Therefore, the Constitutional Court had to first address the question of whether the contested part of § 221 par. 2 of the Civil Procedure Code is consistent with the constitutional order. The Constitutional Court did not agree with the arguments of secondary party no. 5) that the complainant, in formulating her constitutional complaint, acted inconsistently with the process foreseen in § 74 of the Act on the Constitutional Court, as she first questioned the constitutionality of the legal regulation, and subsequently derived from that violation of her constitutionally guaranteed rights. In the constitutional complaint, the complainant claimed that the particular decision that was contested by the constitutional complaint violated her constitutionally guaranteed right to a lawful judge and the

other abovementioned fundamental rights. Thus, the fundamental requirement set forth in § 74 of the Act on the Constitutional Court was met. Of course, according to the logic of the complainant's arguments it would be necessary to first review whether it is even possible in abstracto to remove a matter from a judge in the manner described; if the Constitutional Court concluded that such actions were inconsistent with Art. 38 par. 1 of the Charter, that would automatically mean that the decision adopted on the basis of the contested resolution would be unconstitutional.

17. The Constitutional Court therefore subjected the words "or that serious defects occurred in the proceeding" in § 221 par. 2 of the Civil Procedure Code to constitutional law review, and found that the petition to annul that provision was manifestly unfounded.

18. The contested provision reads: "If the appeals court annuls a proceeding because a binding legal opinion was not observed (§ 226 par. 1, § 235h par. 2, second sentence, and § 243d par. 1), or that serious defects occurred in the proceeding, it may order that a different panel (individual judge) handle and decide the matter further, or it may assign the matter for further proceedings to a different first-level court that is subordinate to it [the appeals court]."

19. Under Art. 38 par. 1 of the Charter no one may be removed from the jurisdiction of his lawful judge. The jurisdiction of courts and the competence of judges shall be provided by law.

20. The principle of a lawful judge is one of the fundamental guarantees of independent and impartial judicial decision-making in a law-based state, and a condition for the proper exercise of that part of state authority that was constitutionally entrusted to the courts (cf., e.g., Constitutional Court judgment file no. III. ÚS 529/08, available at <http://usoud.cz>, judgment file no. III. ÚS 232/95, N 15/5 SbNU 101).

21. The primary, though not the only, purpose of the right to a lawful judge is to rule out arbitrary manipulation in assigning matters to individual judges, i.e. to ensure impartial decision making by an independent court (Constitutional Court judgment file no. II. ÚS 1009/08, available at <http://usoud.cz>). On the one hand, the constitutional imperative that no one may be removed from the jurisdiction of his lawful judge completes and strengthens judicial independence, and on the other hand it gives every party to a proceeding the same valuable guarantee that his matter is to be decided by courts and judges according to principles established in advance (procedural rules), so that the principle of fixed assignment of court agendas is preserved and so that the selection of courts and judges "ad hoc" is ruled out, for various reasons and different aims. The constitutional principle of a lawful judge cannot be circumvented, no matter what reasons there may be to do so. Not only the experience of history, but also the experience from the recent totalitarian regime, persuasively demonstrate how dangerous it is for the individual, and how harmful for the entire society, in the determination of the law, to assign courts and judges to the exercise of justice based on self-serving viewpoints or selection (III. ÚS 232/95, N 15/5 SbNU 101).

22. While the aim of the manipulatory assignment of cases that was typical of totalitarianism is to fulfill the will of those performing the assignment (usually party bodies), the purpose of the right to a lawful judge in a liberal democracy is to ensure impartial and free decision making, i.e. determination of the meaning and aim of a legal norm or statute that is to be applied so that a just decision can be made (Constitutional Court judgment file no. II. ÚS 1009/08, available at <http://usoud.cz>).

23. As was already set forth, the guarantees connected to the right to a lawful judge are aimed first of all at the manner of assigning the judge who is to decide one or another case (whether in the first-level trial or in certain statutorily defined situations where the judge is changed), but Art. 38 par. 1 of the Charter also contains an express prohibition on removing a matter from a judge thus assigned, which indicates that a particular matter should always be decided by one and the same judge, unless there are no serious objective reasons against it. In other words, the constitutional guarantees apply both to appointing a panel (individual judge) that will decide a party's case, and to the stability of judicial personnel, manifested in the prohibition of arbitrary changes in its composition.

24. There is no doubt that the contested part of § 221 par. 2 of the Civil Procedure Code interferes in the constitutionally guaranteed right to a lawful judge, because it permits removing a case from the judge to whom it was originally assigned. This does not violate the guarantees relating to the manner of assigning a judge, because a new judge will again be determined on the basis of the same criteria as the original judge, i.e. according to the work schedule of the relevant court, but it does violate the abovementioned constitutionally guaranteed stability of the composition of a court.

25. Therefore, the Constitutional Court subjected the contested provision to the proportionality test, which is among the standard legal instruments of both European constitutional courts and international courts, when reviewing a conflict between a provision of the legal order that pursues the protection of a constitutionally guaranteed right or public interest with another fundamental right or freedom.

26. The first criterion of the proportionality test is the capacity of the contested provision to achieve the intended aim, which is protection of another fundamental right or public good. In the Constitutional Court's opinion, the contested provision meets this criterion. The constitutionally approved purpose that the contested provision as a whole pursues is protection of the right to a fair trial, which includes the right to have a matter handled in an appropriate time (Art. 36 par. 1 and Art. 38 par. 2 of the Charter). The provision of § 221 par. 2 of the Civil Procedure Code governs situations where the judge of the trial court to whom a matter was assigned is unable to conclude the proceeding in a lawful manner. Thus, this provision protects parties to a proceeding from delays resulting from incorrect procedures followed by the trial court, and permits them to seek protection of their rights. In this regard the Constitutional Court did not agree with the complainant's legal opinion that any errors by the judge, manifesting themselves as defects that burden the proceeding, should be resolved only by a disciplinary complaint, because a disciplinary proceeding with the judge in question does not

sufficiently flexibly address the problem of the parties to the proceeding, and even a potential disciplinary measure against the judge will not necessarily ensure that the proceeding will be handled well.

27. The second criterion of the proportionality test is the aspect of necessity, according to which only those means may be used that most preserve the affected fundamental rights and freedoms; the third criterion is considered to be the principle of proportionality in the narrower sense, under which detriment to a fundamental right may not be disproportionate in relation to the intended aim. As the Constitutional Court already stated in resolution file no. IV. ÚS 111/04 (available at <http://usoud.cz>), the background report to Act no. 59/2005 Coll., which amends the Civil Procedure Code and certain other Acts, indicates that the legislature expected that this institution would be applied only with a restrictive interpretation, so that the effects on the right guaranteed in Art. 38 par. 1 of the Charter would be minimized. In the background report, the legislature made use of this provision subject to the fact that the grounds for annulling the first-level court's decision were a serious (not ordinary) defect, and emphasized that even in these case it is not always appropriate to reassign the case - only if, in the assessment of the appeals court, supported by specific facts, there are grounds for concern that the proceeding might not be concluded in an appropriate manner, if it were conducted before the same panel (judge) or court. The contested provision was inserted into the legal order justifiably, to fulfill an aim pursued by the legislature, but also with the awareness that, because of the possible danger to the constitutionally guaranteed right to a lawful judge, it must be interpreted by constitutionally conforming way by the courts and may be used only exceptionally.

28. Thus, we can conclude that the contested provision is consistent with the constitutional order, because it pursues the protection of another constitutionally guaranteed right, and does so through means that are proportional (necessary); nevertheless, at the same time this provision places considerable demands on the body applying it, which must use it responsibly and interpret it in direct connection with Art. 4 par. 4 of the Charter (more on this below).

29. For these reasons the Constitutional Court denied the petition to annul the words "or that serious defects occurred in the proceeding" in § 212 par. 2 of the Civil Procedure Code, as manifestly unfounded under § 43 par. 2 let. a) and b) of the Act on the Constitutional Court.

VI.

30. The Constitutional Court then reviewed whether the High Court, as the appeals court, in the matter in question, acted according to the abovementioned maxims, i.e. interpreted its competence in a restrictive manner and applied § 221 par. 2 of the Civil Procedure Code in a manner that preserved, to the maximum extent possible, the constitutionally guaranteed right of the parties to a lawful judge. After reviewing the contested decision and the proceeding that preceded it, the Constitutional Court found that this was not the case, and that verdict II. of the High Court resolution of 23 February 2009, ref. no. 1 Co 349/2008-322, unjustifiedly interfered in the complainant's constitutionally guaranteed right to a

lawful judge under Art. 38 par. 1 of the Charter.

31. In its case law, the Constitutional Court consistently applies the principle of minimizing interference in the decision-making activity of other state authorities. One of its manifestations, and also one of the fundamental attributes of a proceeding on a constitutional complaint, is the fact that, as a rule, the Constitutional Court exercises its review authority in a proceeding on a constitutional complaint only in relation to proceedings that have been concluded with legal effect after all ordinary and extraordinary appeals have been exhausted. However, as regards decisions adopted under § 221 par. 2 of the Civil Procedure Code, the Constitutional Court makes an exception, in view of the exceptional importance of the right to a statutory judge for the constitutional conduct of a proceeding, because, as it has already explained in detail in resolution file no. IV. ÚS 111/04, there is no other remedy against a decision to assign a case to a different judge, and an objection that Art. 38 par. 1 of the Charter has been violated, raised after the entire proceeding has concluded, would obviously not be effective.

32. Therefore, the Constitutional Court reviewed the contested verdict substantively, first considering the question whether the appeals court justified its actions as regards the necessity of removing the case from the lawful judge on the grounds of protecting the parties' right to a fair trial. It found that it is not evident from the reasoning of the contested verdict whether the High Court considered the conflict of the parties' fundamental rights, or whether it merely mechanically applied the competence entrusted to it by law. The purpose of § 221 par. 2 of the Civil Procedure Code as a whole, as explained above, is primarily to "unblock" a proceeding that is burdened by the inability of the first-level court to conclude the matter in a lawful manner. This purpose is served both by the possibility or removing a case from a judge due to failure to respect a legal opinion, and due to the existence of serious defects in the proceeding. Thus, § 221 par. 2 of the Civil Procedure Code implements the right to judicial protection (it will be possible to conclude the case) and prevents delays in a proceeding. Of course, the requirement of restrictive interpretation of the latter competence (removing a case due to serious defects in a proceeding) indicates that this will always be an exceptional step, justified by the high probability that if the matter were left to the present judge, he would not be able to conclude the proceeding in a manner that the appeals court could approve of. In the event of doubts, the court should always incline toward the constitutionally guaranteed stability of the composition of a court, especially in a review of a first judgment issued in a matter, where the first-level court has not yet been given guidance, include in the event of procedural questions which, as is evident from the differing statements by the complainant and the secondary parties, can also be disputed.

33. In the Constitutional Court's opinion, the High Court, as the appeals court, did not provide sufficient justification for its decision to remove the case from judge JUDr. Vojtěch Cepl, because from a constitutional law standpoint, for such a step, a mere list of serious defects that the court first-level court was to have committed, without stating reasons for the concern that further proceedings before the same judge will not fulfill the parameters of a fair trial, is not sufficient. The lack of appropriate justification is a violation of the complainant's

constitutionally guaranteed right to a lawful judge under Art. 38 par. 1 of the Charter, because it removes the case from the originally assigned judge, without the requirements for such a step having been met.

34. Because the Constitutional Court found the contested decision to have a defect, consisting of the lack of appropriate justification, which by itself was sufficient grounds for cassation of the contested verdict, it was not required to proceed to the next step, which would have been a substantive review of whether the reasoning was consistent with the complainant's constitutionally guaranteed right to a lawful judge, including an evaluation of whether or not the first-level court was correctly criticized for defects. Nevertheless, in this regard, given that the High Court may rule again in the matter, the Constitutional Court emphasizes, that the reasons for acting pursuant to § 221 par. 2 of the Civil Procedure Code may only be serious defects, in the sense of defects that are quite fundamental and obvious, and this term must always be interpreted restrictively, so as to preserve, to the maximum extent possible, the constitutionally guaranteed rights of the parties to the proceeding.

35. In connection with the possible interference in the right of the complainant and the secondary parties to a fair trial, or the right to have the matter handled in an appropriate time, the Constitutional Court also emphasizes that the proceeding before the first-level court took place without delays, and the decision on the merits was issued less than half a year after the complaint was filed, which considerably reduces the risk that giving the same judge a "second attempt" will significantly interfere in the constitutionally guaranteed rights of the parties enshrined in Art. 38 par. 2 of the Charter.

36. As regards the claims of secondary parties no. 2), 3) and 7), that the hidden reason for the appeals court's actions was a skepticism, based on its past experience, about the quality of decision making by judge JUDr. Vojtěch Cepl, the Constitutional Court states that such deliberations were completely absent from the appeals court's reasoning (and from its response to the constitutional complaint), and therefore it denied the petition to admit evidence in this regard. Peripherally, the Constitutional Court notes that such justification for applying § 221 par. 2 of the Civil Procedure Code would be completely unacceptable from a constitutional law viewpoint due to obvious prejudice on the part of the appeals panel.

37. The Constitutional Court states, only as obiter dictum, one other reason that should also lead the High Court to restrain when applying § 221 par. 2 of the Civil Procedure Code, the fact that it is undoubtedly also in the interest of the secondary parties to have the same individual judge continue the proceeding. If the purpose of the complaint is protection of their good name and professional reputation, as well as the reputation of the judiciary as such (which can also be concluded from the fact that they requested that the complainant be required to inform the media about her apology), then removing the case from judge JUDr. Vojtěch Cepl devalues the secondary parties' possible success in the eyes of the public in advance. The criticism, because of which the proceeding on a complaint for protection of personality is being conducted, was directed at the actions of the secondary parties in the criminal prosecution of the former Deputy Prime Minister,

Jiří Čunek, and one of the most criticized points was the removal of the criminal matter from the District State Prosecutor's Office in Přerov, where the state prosecutor intended to file charges, and reassignment to the District State Prosecutor's Office in Jihlava. Therefore, in this context, an analogous action, i.e. removing the matter from the judge who issued a judgment against the secondary parties, necessarily seems disputable, at the very least.

38. Based on these reasons, the Constitutional Court, under § 82 par. 3 let. a) of the Act on the Constitutional Court, annulled verdict II. of High Court resolution of 23 February 2009, ref. no. 1 Co 349/2008-322, because it violated the complainant's constitutionally guaranteed right to a lawful judge under Art. 38 par. 1 of the Charter. The consequence is that after cassation of the contested decision the matter will be returned for consideration and a decision to the first-level court, with personnel as duly assigned.

Instruction: Decisions of the Constitutional Court cannot be appealed.